KIN NAM DEVELOPMENT SDN. BHD.

v.

KHAU DAW YAU

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 23 OF 1983]
20 JANUARY 1984

CONTRACT: *Agreements of sale and purchase of houses to be built - Subsequent conversion and subdivision of land made subject to special condition - Whether condition had force of law - Whether agreements frustrated - Contravention of rr. 11, 17, Housing Developers (Control & Licencing) Rules 1970.*

The appellant, a housing developer, applied for conversion and subdivision of a piece of land in Kuantan. Meanwhile, all the proposed subdivided lots were booked by members of the public, including four of the plaintiffs in the High Court civil suits. Booking fees were paid and booking forms signed. Approval of the application for conversion and subdivision was made subject to a condition that some of the houses to be built should be reserved for the Pahang State Economic Corporation (the Corporation) which would hold them for prospective Bumiputra purchasers. The appellant was also involved in the development of another piece of land, owned by the Futo Trading Company Sdn. Bhd. (Futo), which had no developer's licence. Application was made for conversion and sub-division. Approval was given subject to a condition that 30% of the houses to be built on the land should be reserved for the Corporation. All the proposed lots were booked by members of the public, including three plaintiffs in the other civil suits, before approval for conversion and subdivision had been obtained. The contracts were between the appellant and the purchasers. The appellant decided to build only 4 units. The plaintiffs as purchasers claimed specific performance of their contracts. The appellant was held liable and damages were awarded. The appellant appealed.

Held:

A. Appeal regarding the first piece of land

[1] The special condition to which approval of conversion and subdivision was made subject had the force of law, as it was imposed under "requirements" under s. 136(1) of the National Land Code.

[2] The doctrine of frustration had no application to the case.

(a) The substance of each of the contracts remained the same as before the special condition was imposed. The basis of the doctrine is not hardship or inconvenience or material loss but such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

(b) Further, the special conditions were not completely unexpected. There was no basis for the appellant to assume that its application for subdivision and conversion would be approved without conditions or even approved at all.

B. Appeal regarding the second piece of land

[1] The question regarding the legality of the contracts on the ground that Futo, the proprietor of the land in question, had not been a party to the contracts, should not have been dealt with by the trial Judge. The above question raised a substantial question of law and the facts should have been pleaded in the defence. But as this had not been done, the question should have been left open.

[2] In any case, there was nothing illegal about the consideration or object of the contracts. Section 24 of the Contracts Act did not apply. Although the appellant might be guilty of an offence under r. 17 of the Housing Developers (Control & Licensing) Rules 1970, for contravention of r. 11(1) of the above Rules, the Rules did not affect the validity or otherwise of the contracts.

C. Damages

The respondents were entitled to damages only. The Court below should proceed to fix the damages.

[Appeal dismissed.]

Cases referred to:

Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor. [1981] 1 MLJ 56
Taylor v. Caldwell [1863] 3 B & S 826
Davis Contractors Ltd. v. Fareham UDC [1966] AC 696
Jackson v. Union Marine Insurance Co. Ltd. [1874] LR 10 CP 125

Legislation referred to:

Contracts Act 1950, s. 24
Housing Developers (Control & Licensing) Rules 1970, rr. 11, 17
National Land Code Act 56/1965, s. 136(1)

For the appellant - D.J. Puthucheary (K. Y. Foo with him); M/s. Skrine & Co.
For the respondent - A. Ramanathan; M/s. H.Y. Lee & Hee

JUDGMENT

Salleh Abas CJ:

This is an appeal from the decision of V.C. George J arising out of the trial of a consolidation of seven civil suits, namely: Civil Suits Nos. 256, 237, 258, 259, 274, 263 and 257 of 1978.

The facts which are not in dispute are as follows: The appellant, a housing developer under Licence No. 232/72 issued on 18 September 1972, was proposing to develop two pieces of land in Kuantan into a housing estate to be known as Lucky Garden.

The first piece, namely Lot 953 held under EMR No. 530 was a piece of rubber land registered under the appellant's name. The appellant applied to Pahang State Government for conversion and subdivision of the land into 32 building lots of which 9 lots were for semi-detached houses and the remaining 23 lots for single-storey terrace houses. The application was made on 12 December 1972 and approval was given on 28 October 1974. In the meantime, presumably in response to the appellant's invitation members of the public started to book the proposed lots with buildings to be erected thereon. They even did so before the appellant had obtained its developer's licence. The plaintiff in CS No. 237/78 made a booking as early as 18 August 1972, whilst the three plaintiffs in CS Nos. 256, 258 & 263 of 1978 booked their lots on 12 December 1972, the day when the appellant submitted its application for conversion

and subdivision of the land, each paying RM600 booking fee - upon signing a booking form. All the 32 proposed subdivided lots were booked before approval for conversion and subdivision was obtained. The approval which the Pahang State Government gave was made subject to a condition to the effect that at least 3 out of the 9 semi-detached housing lots and 7 out of the 23 terrace housing lots should be reserved for Pahang State Economic Corporation which would hold them for would-be Bumiputra purchasers. In other words, 10 building lots with houses built on them should be reserved.

The second piece of land was lot 948 held under EMR 3659. This land was also a piece of rubber land formerly registered in the name of a Bumiputra woman, named Tengku Sepiah. She transferred it to Futo Trading Company Sdn. Bhd. (Futo) for the purpose of developing it into a housing estate in return for the 4 units of semi-detached houses to be built thereon for her. As Futo had no developer's licence, it entered into an arrangement with the appellant whereby the land was to be subdivided into 4 semi-detached housing lots and 24 terrace housing lots. Application for conversion and subdivision was approved by the Pahang State Government on 20 November 1973. The 4 semi-detached housing lots were completely built for Tengku Sepiah, but the 24 terrace-housing lots remained unbuilt. All the 24 lots booked by members of the public, of whom were the plaintiffs in C.S. Nos. 274, 257 and 259 of 1978, each paying a booking fee of RM500 upon signing a booking-form. The booking transaction were between the respondents and the appellant, although the land was not registered in its name. Like the first piece of land, the approval of conversion and subdivision of the second piece of land was also given subject to a special condition that at least 30% of the houses built thereon should be reserved for Pahang State Economic Corporation for would-be Bumiputra purchasers.

The 32 lots in respect of the first piece of land and the 24 lots in respect of the second piece of land were all booked before conversion and subdivision approval was obtained and they were all booked by non-Bumiputra purchasers. It is therefore clear that compliance with the special condition would mean that 10 houses in respect of the first piece of land and at least 8 houses in respect of the second piece of land would have to be reserved. It is a matter of difficulty, if not impossibility for the appellant to determine who amongst these buyers should give up their purchases. A suggestion by Futo to determine them by ballots was not acceptable to the purchasers. On the other hand, if the appellant were to proceed to complete the contracts with all its purchasers it would have to go against the special condition of the conversion and sub-division approval. This the appellant is not prepared to do because it accepted that the special condition is binding on it.

The appellant, therefore, decided not to build any of the houses, except the four units of semi-detached houses meant for the previous owner of the second piece of land. The result is that the appellant was taken to Court in these seven consolidated civil suits wherein each plaintiff as a purchaser claims specific performance of the contract.

The appellant denied that it was liable at all. It contended that the booking which each plaintiff made of the lot and the house to be built thereon did not constitute a binding contract and that even if it did so, the contract was rendered not only impossible of performance but also illegal by the imposition of the special condition.

V.C. George J who heard the case in the Court below overruled the appellant's arguments and held that the appellant was liable and accordingly gave judgment in favour of the plaintiffs in the form of damages which are to be assessed later. Hence this appeal.

Before us Counsel for the appellant did not raise the issue as to whether acceptance of the booking constituted a binding contract between the appellant and the purchasers. We think that it is very proper for him to omit it as the ruling of the learned trial Judge on this issue is unassailable. (*Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor*. [1981] 1 MLJ 56).

In view of the different issues involved in this appeal, we propose to divide the appeal in two parts. The first part relates to Civil Nos. 237, 256, 258 and 263 of 1978, which arose from the first piece of land to be developed by the appellant. The second part relates to Civil Suits Nos. 259, 257 and 274 of 1978 which arose from the second piece of land, which the appellant agreed to develop under an agreement with Futo.

The issue involved in the first part of the appeal is whether the contracts were discharged by frustration whilst the issue in respect of the second part is whether the contracts were void for illegality of having contravened the Housing Developers (Control & Licensing) Rules, 1970.

First Part of the Appeal:

Counsel for the respondent submitted that the contracts were not frustrated because the special condition has no force of law, it being only a mere request which the appellant could ignore. In our view the special condition has the force of law; it being imposed as "requirements" under s. 136(1) of the National Land Code. Under the section a subdivision can only be approved if it is in compliance with any "requirements imposed, plan approved or any direction given by the Pahang State Government". (see para. (b) and (c) of s. 136(1) of NLC). Surely the special conditions are "requirements" imposed under the section.

We now turn to consider whether the doctrine of frustration has application to the facts of this case.

The doctrine of frustration which operates to terminate a contract is of recent origin. (see *Taylor v. Caldwell* [1863] 3 B & S 826). It occurs in a situation where due to a change of circumstances a contract is rendered legally and physically impossible of performance. The doctrine is an exception to the general rule as to an absolute contract in that a person who specifically undertakes an absolute obligation cannot afterwards claim to be absolved from liability by the fact that his failure to perform the obligation is due to the occurrence of an event over which he has no control. The doctrine does not apply just because the promisor's obligation has become, because of change of circumstances, more onerous than what he has contracted for. The basis of the doctrine is, as stated by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham UDC* [1966] AC 696 at 729 to be "not hardship or inconvenience or material loss", but "such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". In *Jackson v. Union Marine Insurance Co. Ltd.* [1874] LR 10 CP 125, the charterers were held justified to throw up their contracts with the shipowners when the chartered ship was, due to damages, unable to load the agreed cargo as the loading of cargo after the ship had been repaired would have been "a new adventure" or "a new agreement". Bramwell B, held that the parties were discharged by the ship's inability.

In the present appeal there can be no doubt that it would be a heavy financial burden on the appellant to build the houses contracted for and to complete the contracts with its purchasers because costs have since spiralled. But this point is not a relevant factor for calling the doctrine of frustration into play. To invoke the doctrine the appellant must show that the completion of every one of these contracts is in substance a different obligation

from what it had previously agreed to i.e., a new agreement altogether. In our view the substance remains the same. Each of these contracts was and still is for the sale of houses which the appellant has agreed to build. The special condition which enjoins the appellant to reserve 30% of the houses (in practical terms 10 houses) to be built for the Pahang State Development Corporation may well result in the impossibility of the appellant to determine with fairness who amongst its purchasers are to be deprived of their contracts and who to have their contracts performed, especially when the Pahang State Government gives no indication, nor guidance as to how the appellant should go about in complying with the special condition. To choose certain particular purchasers as those who should lose out even at random may be arbitrary and cause an injustice on them, unless they all agree. But despite this difficulty or impossibility the special condition does in no way change the substance of the appellant's agreement with its purchasers. It can still perform 70% of the contracts, although it may not be able to do justice when choosing which contracts it should perform.

The booking was done and accepted before the land was subdivided. There is no basis for the appellant to assume that its application for subdivision and conversion would be approved without conditions or even approved at all. It should have first waited for the decision of the Pahang State Government on the fate of its application before venturing to advertise and accept booking fees for the proposed subdivided lots. It is no defence for it to say that the special conditions were completely unexpected, because under the law the State Government could even refuse the application altogether, if it was so minded. The appellant had no good reason to expect that its application would be approved at all. As it took great risk so it must pay for it.

The appeal as regards the Civil Suits Nos. 237, 256, 258 and 263 must therefore be dismissed with costs.

Second Part of the Appeal:

As regards Civil Suits Nos. 274, 257 and 259 of 1978, Counsel for the appellant submitted in the Court below that since Futo, who is the proprietor of the land was not made a party to the booking transactions, whatever contracts which arose therefrom were illegal by virtue of r. 11(1) of the Housing Developers (Control & Licensing) Rules, 1970 - PU (A) 268/1970 and therefore null and void.

Rule 11(1) provides as follows:

> 11.(1) No licensed housing developer who is not the proprietor of the land upon which a housing development is carried out shall enter into any contract of sale of any housing accommodation in that housing development unless the proprietor of the land is also a party to such contract of sale and agreed to the sale of the land for the purpose specified in such contract of sale.

We know that breach of this rule by a housing developer renders him liable to be prosecuted for an offence under r. 17 which is as follows:

> 17. Any licensed housing developer who contravenes any of the provisions of these Rules shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding RM3,000 and for a second and subsequent offence to a fine not exceeding RM5,000 or imprisonment for a term not exceeding 6 months or to both such fine and imprisonment.

But what is the effect of the breach on the contracts? Neither the Rules nor the Act under which the Rules were made say anything. The only provision which is relevant in this context is s. 24 of the Contracts Act, which is as follows:

24. The consideration or object of an agreement is lawful, unless-

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Therefore, the question raised by Counsel in the Court below is whether non-compliance with r. 11(1) renders the contracts illegal by virtue of s. 24 of the Contracts Act.

This is a substantial question of law and facts which in our view should be pleaded in the appellant's statement of defence. Before this question could be answered the appellants should have at least pleaded the facts upon which they wish the Court to give this legal result. They did no such thing in their statement of defence or in the agreed statement of defence or in the agreed statement of facts. We, therefore, think that the matter should not be dealt with by the learned trial Judge and the point should be left open, because there is no proper factual basis upon which a ruling could be made.

In any case there is nothing illegal about the consideration or object of the contracts because they are only contracts for the sale and purchase of houses, and neither do they come within any of the paragraphs of s. 24 quoted above, although the appellant may well be guilty of an offence under r. 17 for contravening r. 11(1) of the Housing Developers (Control & Licensing) Rules 1970. In other words, these Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers.

In conclusion, we are of the view that the appeal should be dismissed with costs. We confirm the learned Judge's ruling that the respondents are entitled to damages only instead of specific performance. There will be an order that the Court below should proceed to fix the damages.

The deposit should be paid to the respondent on account of taxed costs.

Also found at [1984] 1 CLJ 347